INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Bannister v. *United States*, 379 F. 2d 750 certiorari denied, 390 U.S. 927	9
Claunch v. *United States*, 155 F. 2d 261	6
Costello v. *United States*, 350 U.S. 359	8
Lawn v. *United States*, 355 U.S. 339	8
Pereira v. *United States*, 347 U.S. 1	9
State of Louisiana v. *Cardinale*, 251 La. 827, 206 So. 2d 510, certiorari granted, November 25, 1968, No. 76, this Term	6
United States v. *Grow*, 394 F. 2d 182, certiorari denied, October 14, 1968, Nos. 264, 275, this Term	9
United States v. *Pinna*, 229 F. 2d 216	6
United States v. *Shavin*, 287 F. 2d 647	9

Statutes:

18 U.S.C. 1341	2
26 U.S.C. 4705(a)	5

Miscellaneous:

McCormick, *Evidence* 91 (1954)	6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 828

MARTIN STERNBACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 402 F. 2d 353.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1968. A petition for rehearing was denied on November 14, 1968. The petition for a writ of certiorari was filed on December 11, 1968. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge's treatment of petitioner's contention that a prior conviction was too remote in time to be admissible for impeachment was justified.

2. Whether the indictment was subject to post-conviction attack on the ground that witnesses who testified at trial and who had given statements to an investigator before trial, did not testify before the grand jury.

3. Whether the evidence supports the verdict.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on twenty-one counts of mail fraud (18 U.S.C. 1341). On April 11, 1967, he was sentenced to concurrent two-year terms and fined $5,000. The court of appeals affirmed (Pet. App. 1-9).

The evidence showed that from January 1962 to April 1964, various lawyers in Chicago referred clients who had been accident victims to petitioner, a physician, for treatment. On their first visit the clients were given a limited physical examination. In every case these clients made some return visits to petitioner's office. Some were ordered hospitalized for approximately one week. Petitioner, however, exaggerated the number of office visits on the medical bills

he submitted to the attorneys and provided false diagnoses and misrepresentations of the treatment he administered on the medical reports he submitted. These medical reports and bills were then mailed by the various attorneys to the insurers involved, and were a primary factor relied upon by the adjusters in arriving at an amount deemed appropriate in settlement of the accident claims.

A typical example of petitioner's pattern of conduct was the case of Ronald J. Carlsen. After being struck by a bus, Mr. Carlsen consulted an attorney, who referred him to petitioner (A. 44).[1] Carlsen visited petitioner on the day of the accident or the following day, at which time petitioner examined his arm, neck, and ear. Carlsen subsequently made two more visits to petitioner's office for examinations. But the bill petitioner submitted to Carlsen's attorney listed ten office visits, totalling $100. At trial Carlsen testified that on his first office visit petitioner "told me that I was smart enough to keep my mouth shut . . . and . . . the visits were going to be pre-determined at $100, $10 a visit" (A. 44). Petitioner prepared a medical report, stating that sedatives and anti-spasmodics had been given Carlsen for pain, and that diathermy treatments had been applied to contused portions of the victim's body (A. 47). In fact, the medical care Carlsen received was limited to the physical examinations (A. 44).

---

[1] Citations are to "Appellant's Appendix," filed with the Clerk of this Court.

ARGUMENT

1. During the government's case, defense counsel asked the trial judge whether, if petitioner were to take the witness stand, the government would be allowed to use a 25-year old narcotics conviction for impeachment purposes (A. 107-108). If so, said counsel, he would seriously consider keeping petitioner off the stand. The court told counsel "We will check it out." (A. 108). Government counsel cited cases from the Seventh Circuit tending to approve the admission of prior convictions in this situation (A. 109). The court then declared that it would follow the law of the jurisdiction (A. 109):

> If the law is as stated so far, without my reading the decisions, it seems I will have to permit the Government to do it if they intend to do it.

The matter was not discussed again for the remainder of the trial. Petitioner did not testify in his own behalf. On appeal, petitioner argued that the trial court had erred in "ruling" that the prior conviction was admissible to impeach him.

As the court of appeals observed, the entire context of the discussion of the issue reveals that the district judge did not, in fact, rule on the admissibility question at that preliminary juncture. The informal colloquy between court and counsel on the prospective issue of admissibility cannot be elevated to the stature of a hearing on a motion, appropriately and timely made, which resulted in a binding ruling. The judge's statements demonstrate that he was concerned about the problem, was sympathetic to petitioner's contention,

but deferred making a final ruling until he had an opportunity to read the relevant case law and until the question was squarely presented.[2] But defense counsel did not pursue the matter later and petitioner did not take the stand. Thus, the trial court had no occasion to make a considered ruling on the issue.

The most that could be said of the judge's statements is that he was suggesting a tentative ruling which he, in his discretion, thought it inappropriate to finalize at that time. The admissibility of a prior conviction turns on its relevance and its probative value on the question of the defendant's credibility. Here, petitioner, a physician, was accused of misusing his professional status in a fraudulant scheme. His prior conviction involved the unlawful dispensing of narcotics without a proper order form, in violation of the forerunner of 26 U.S.C. 4705(a). If petitioner had sought to rely on his professional status to refute the instant charges, the earlier conviction might well have been relevant to such a defense. Without hearing petitioner's testimony, and in the absence of even a proffer of what his testimony would be, the court could not have been expected to rule that the mere age of the prior conviction rendered it absolutely inadmissible. The admission of that prior offense, coupled with a jury instruction on its limited purpose, might well have been a proper exercise of discretion.

---

[2] Compare the court's tentative assurance on this matter, "We will check it out," with its denial of petitioner's motion to dismiss for lack of evidence before the grand jury: "That motion will be denied, Mr. Bellows. I have checked it out." (A. 164).

See *United States* v. *Pinna*, 229 F. 2d 216 (C.A. 7); *Claunch* v. *United States*, 155 F. 2d 261 (C.A. 5); McCormick, *Evidence* 91 (1954).

Petitioner suggests (Pet. 6) that *State of Louisiana* v. *Cardinale*, 251 La. 827, 206 So. 2d 510, certiorari granted, November 25, 1968 (No. 76, this Term), presents an issue similar to that raised here. But in that case, where the defendant was convicted of murder and sentenced to death, there was testimony that defendant voluntarily surrendered to police in Tucson, Arizona, who knew nothing of the defendant or the crime he had committed, and volunteered a statement. In the course of testifying at trial to the contents of the statement, the police officers referred to defendant's admission to them that, several months before, he had been convicted of sodomy and had thereafter sought out the prosecutrix in that case with intent to kill her. The issue presented in *Cardinale* is whether the defendant was deprived of a fair trial because of the admission in evidence of his entire confession, as required by state law, thereby providing the jury with the damaging recital of the unsuccessful attempt to kill. That issue is quite distinct from the question of the admissibility of evidence of a prior conviction for impeachment purposes.

2. Neither before nor during trial did petitioner challenge the sufficiency of the indictment or the foundation for it. One month after the guilty verdict, petitioner filed a "Petition for Relief from Waiver of Objection Based on Defect in the Institution of the Prosecution," alleging that facts first learned at trial gave him reason to believe that the indictment was not

founded on sufficient evidence. His prayer was based on the fact that, during the trial, a number of the forty-six prosecution witnesses—not including an investigating agent, Charles Botkin—were asked whether they had appeared before the grand jury. Only an insurance adjuster replied that he had (A. 73). The others replied in the negative, indicating, however, that they had given a statement to Botkin or a Mr. Culkin. At a hearing on this motion petitioner acknowledged that he had no authority to support his claim to relief in those circumstances, and the court denied the motion, stating "I have checked it out." (A. 164).

Even if it had been timely made, the motion to dismiss the indictment on the grounds alleged was without merit. Petitioner did not ask all of the government witneses whether they had testified before the grand jury, and the record does not state whether any who were not asked did appear. The record does indicate that the government intended to elicit from its last witness, Mr. Botkin, the fact that he *had* testified before the grand jury, and had presented to that body the results of his investigation and the statements of the other witnesses who testified at trial but not before the grand jury; but a defense objection to such testimony was sustained (A. 159-160, Tr. 630). The witnesses' statements, together with the testimony of the insurance adjuster and Botkin, provided sufficient "rational evidence" for the indictment. No one of the patients had the kind of unique knowledge which would make his personal testimony necessary or very desirable for the grand jury's deliberations. It

was the combination of the statements as to the number of visits each patient said he had made, plus the pattern of inflated reports, which showed the fraud. The investigator and the adjuster were the logical persons to present that evidence. See *Lawn* v. *United States*, 355 U.S. 339, 349; *Costello* v. *United States*, 350 U.S. 359, 364.

3. The record amply supports the jury's verdict that petitioner engaged in an unlawful scheme to defraud insurance companies and the Chicago Transit Authority, and caused the mails to be used in the execution of that scheme. The consistent pattern of the scheme was described by twenty-six accident victims, who initially came to petitioner on advice of their counsel, and ultimately received less medical care and made fewer office visits than petitioner represented in his medical reports and bills. These medical statements composed by petitioner were prepared over a period exceeding two years, from April 1962 to July 1964.

Petitioner's challenge to the sufficiency of the evidence appears to be twofold: that the government failed to establish (1) that the medical reports were prepared by petitioner, or (2) that he caused the mailing of these reports to the insurers. The first contention invites the Court to ignore reality. The medical reports and bills were on stationery containing petitioner's name and the stamped signature "Martin Sternback, M.D." Petitioner was identified by all of the accident witnesses as the doctor who had examined them. Although some of the dates listed on the bills were fictitious, in each case the date listed for the first visit or for any hospital visits corresponded to the

testimony of the witnesses. The bills and reports were sent to thirteen different insurance companies and a bus company from nine different law offices. From these circumstances, the jury was warranted in concluding beyond a reasonable doubt that only petitioner could have been the source of the medical bills and reports. Indeed, as noted by the court of appeals (Pet. App. 5) any other conclusion would have been "purely fanciful." See *United States* v. *Shavin*, 287 F. 2d 647, 652 (C.A. 7).

Petitioner's allegation regarding the absence of direct evidence that he contemplated that the medical reports would be transmitted to the insurers via the mails is also unrealistic, in view of the duration of the scheme and the number of individuals and reports involved. The jury was entitled to infer that petitioner reasonably contemplated that the reports would be sent through the mails, as indeed they were. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Grow*, 394 F. 2d 182, 205 (C.A. 4), certiorari denied, October 14, 1968 (Nos. 264, 275, this Term); *Bannister* v. *United States*, 379 F. 2d 750 (C.A. 5), certiorari denied, 390 U.S. 927.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JANUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330126 407